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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 18th July, 2019

+ **CS (COMM) 470/2016 & CC(COMM) 73/2017**

SSMP INDUSTRIES LTD. Plaintiff

Through: Mr. Umesh Mishra, Advocate.
(M:9868401295)

versus

PERKAN FOOD PROCESSORS PVT. LTD. Defendant

Through: Mr. Kumar Sudeep, Advocate.
(M:9560971646)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. An interesting issue has arisen in this matter in respect of the interpretation of Section 14 of the Insolvency and Bankruptcy Code, 2016 (*hereinafter the 'Code'*). The Plaintiff has filed the present suit seeking recovery of Rs.1,61,47,336.44. The Plaintiff had placed an order on the Defendant for purchase of *Totapari Mango pulp*. As part of the said transaction, it is the case of the Plaintiff that an agreement had been entered into, supplies were made and various amounts are due towards excess payments, damages and other costs. The Defendant has filed its written statement/counter claim in which it avers that it is, in fact, entitled to recover a sum of Rs.59,51,548/- and no amount is due and payable by it to the Plaintiff.

2. The Plaintiff company has since gone into insolvency and a Resolution Professional has been appointed. The question has arisen as to whether the adjudication of the counter claim would be liable to be stayed in

view of Section 14 of the Code. The contention of Id. counsel for the Plaintiff is that the claim of Rs.59,51,548/- by the Defendant is in the nature of a set off and is intertwined and interlinked with the Plaintiff's suit. It is not an independent claim by the Defendant, but is to be adjudicated in the light of the claims made by the Plaintiff in the suit. He submits that since at this point the claim itself is not yet adjudicated and it is not even clear whether any amount would be recoverable by the Plaintiff, both the suit and the counter claim ought to be adjudicated together instead of the Defendant being forced to approach the Resolution Professional for recovery of its claims. He relies upon the recent order of the National Company Law Appellate Tribunal ('NCLAT') in *Jharkhand Bijli Vitran Nigam Ltd. V IVRCL Limited & Anr. Company Appeal (AT) (Insolvency) No. 285/2018 Decided on 3rd August, 2018*, as also the judgment of a Id. Single Judge of this Court in *Power Grid Corporation of India v. Jyoti Structures Ltd., (2018) 246 DLT 485*. Mr. Mishra, Id. counsel appearing for the Plaintiff submits that he has no objection if the suit and the counter claim are adjudicated before this Court.

3. A perusal of the counter claim shows that the Defendant's position is that no amount is recoverable from it but that it is, in fact, entitled to recover a sum of Rs.59,51,548/- due to various breaches by the Plaintiff.

4. The claim of the Plaintiff is much higher i.e. a sum of Rs.1,61,47,336.44, than what is claimed by the Defendant. The transaction between the parties would require to be adjudicated on the basis of correspondence and the agreement, which have been placed on record. This Court would have to first determine the question as to whether any amount at all is payable to the Plaintiff. Even if the counter claim is decreed fully

and the claim of the Plaintiff is also allowed, the Plaintiff would, in fact, be entitled to recover and not the Defendant. The possible outcome of the suit and the counter claim is in the realm of uncertainty. The question as to the amount that would be liable to be paid by either party to the other is not something that can be predicted at this point. The entitlement of the Defendant to the amount claimed from the Plaintiff is also not concrete and settled. There is no doubt that adjudication of the plaint and counter claim are interlinked with each other.

5. A Id. Single Judge of this Court in *Power Grid Corporation (supra)* has held that embargo of Section 14(1)(a) of the Code would not apply in all circumstances. The observation of the Court is as under:

“14. Hence for following reasons I conclude the present proceeding would not be hit by the embargo of Section 14(1)(a) viz., (a) ‘proceedings’ do not mean ‘all proceedings; (b) moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor; (c) continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code; (d) term ‘including’ is clarificatory of the scope and ambit of the term ‘proceedings’; (e) the term ‘proceeding’ would be restricted to the nature of action that follows it i.e. debt recovery action against assets of the corporate debtor; (f) the use of narrower term “against the corporate debtor” in section 14(1)(a) as opposed to the wider phrase “by or against the corporate debtor” used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability; (g) the Arbitration Act draws a distinction between

proceedings under section 34 (i.e. objections to the award) and under section 36 (i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a).”

6. A perusal of the judgment shows that until and unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, it would not be prohibited under Section 14(1)(a) of the Code.

7. In *Jharkhand Bijli* (*supra*), the NCLAT has, in similar circumstances, held that until and unless the counter claim is itself determined, the claim and the counter claim deserve to be heard together and there is no bar on the same in the Code. The observations of the NCLAT are as under:

“3. As the claim of the Corporate Debtor can be determined only after determination of counter claim made by the Appellant in the very same arbitral proceedings and if the counter claim or part of it is set off with the claim made by the Corporate Debtor, were of the view that both the claim and the counter claim of parties should be heard together by the Arbitral Tribunal in the absence of any bar under Insolvency and Bankruptcy Code, 2016.

4. However on determination, it is found that the Corporate Debtor is liable to pay certain amount, in such case, no recovery can be made during the period of moratorium.”

8. The Court has considered the plaint and the written statement/counter claim. The adjudication of the plaint, defences in the written statement and the amounts claimed in the counter claim would have to be considered as a whole in order to determine as to whether the suit or the counter claim would be liable to be decreed. A counter claim would be in the nature of a suit against the Plaintiff which in this case is the 'corporate debtor'. Under Section 14(1)(a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars '*the institution of suits or continuation of pending suits or proceedings against the corporate debtor*'. A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor i.e., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.

9. The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the

task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court.

10. List before the Joint Registrar on 4th September, 2019 for Plaintiff's evidence.

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**PRATHIBA M. SINGH
JUDGE**

JULY 18, 2019/dk